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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

JAMES BEST,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for Writ of Certiorari to the United States Court Of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner James Best was convicted of aiding and abetting a Medicare fraud perpetrated by Jerome Maciejewski. The only evidence linking Best with Maciejewski's scheme was hearsay testimony that Maciejewski stated he would "call Albany and talk to Jim and take care of" something. This testimony was admitted over objection against Best to prove that Best's writing of a cost allocation memo was carried out pursuant to Maciejewski's scheme. It was admitted under the state-of-mind exception to the hearsay rule, *see* Fed.R.Evid. 803(3), even though Best was not the declarant. The Second Circuit affirmed the conviction and held that hearsay testimony regarding a declarant's intent may be admitted to prove the subsequent conduct of a third party, so long as there is independent evidence connecting the declarant's statement with the third party's actions. In the present case, such "independent evidence" consisted of the similarity of Best's memo to a memo written by Maciejewski.

The question presented is:

Did the Second Circuit err in holding–in agreement with the Ninth Circuit but in conflict with rulings of the First and Fourth Circuits–that state-of-mind hearsay testimony regarding the declarant's intended actions may be admitted against a third party to prove the third party's subsequent conduct?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding below were:

Appellant (Petitioner herein): James Best.[1]

Appellee (Respondent herein): United States of America

[1] The case below was originally captioned: ***UNITED STATES OF AMERICA, Appellee v. JEROME MACIEJEWSKI, also known as Jerome Maciejewski, and JAMES BEST, Defendants-Appellants.*** However, Maciejewski withdrew his appeal prior to the filing of briefs on the merits.

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IN THE
SUPREME COURT OF THE UNITED STATES

JAMES BEST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court Of Appeals
For The Second Circuit

Petitioner James Best prays that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review the opinion of that court in *United States of America v. James Best.*

OPINIONS BELOW

The opinion of the Second Circuit is reported at 219 F.3d 192 (2d Cir. 2000) and appears in the Appendix at 1a. The opinion of the U.S. District Court for the Northern District of New York is reported at 170 F. Supp.2d 129 (N.D.N.Y. 1999) and appears in the Appendix at 18a. The Second Circuit's order of September 19, 2000 denying the petition for a panel rehearing is unreported and appears in the Appendix at 35a.

JURISDICTION

The Second Circuit denied Appellant-Petitioner's petition for panel rehearing on September 19, 2000. App. 35a. The Second Circuit issued its decision on July 25, 2000. App. 1a. This Court has jurisdiction to issue a Writ of Certiorari to the Second Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Major Fraud Act, 18 U.S.C. § 1031, is found in the Appendix at 37a. The Aider and Abettor Act, 18 U.S.C. § 2, is found in the Appendix at 41a. The Hearsay Rule, Federal Rule of Evidence 802, is found in the Appendix at 42a. The "State of Mind" Exception to the Hearsay Rule, Federal Rule of Evidence 803(3), is found in the Appendix at 43a.

STATEMENT OF THE CASE

Petitioner James Best ("Best") was indicted on one count of aiding and abetting a Medicare fraud perpetrated by codefendant Jerome Maciejewski ("Macie"). The district court's jurisdiction was based upon 18 U.S.C. § 3231.

Macie was the Executive Vice President of Blue Shield of Western New York. He was responsible for the oversight of all three divisions of the corporation, one of which was the Albany division. Best was the Chief Operating Officer of the Albany division. The fraud involved the submission of false claims for Medicare reimbursement for company expenses that were ineligible for such compensation.

The case against Macie was substantial and detailed,

showing his planning of the scheme and creation and submission of a series of false documents in furtherance thereof, including fraudulent memos seeking Medicare cost allocation. Best allegedly aided Macie's fraud by submitting a single cost-allocation memo from his division to company accounting.

Unlike the powerful evidence against Macie, the case against Best was thin. The prosecution relied primarily upon only two facts: (1) hearsay testimony that Macie told a colleague he would contact "Jim in Albany" to "take care of" something for him in connection with his scheme, and (2) Best's memo was similar to one drafted and submitted by Macie. From this, the government argued that Macie must have contacted Best, recruited him into the criminal venture, and dictated the contents of his memo. The trial court relied upon those compounded inferences to admit the critical hearsay statement against Best under the "state of mind" exception to the rule against hearsay. The prosecution used that statement as proof of Best's subsequent conduct, specifically, his alleged later discussion with Macie and knowing participation in the fraud.

The district court based its ruling upon Second Circuit precedent regarding admission of state-of-mind hearsay testimony to prove subsequent conduct of third parties. Under the Second Circuit's interpretation of the state-of-mind exception to the hearsay rule, out-of-court declarations of intent may be admitted to prove the subsequent conduct of a third party, as long as there is some independent evidence connecting the statement of intent with the third party's conduct.

Presently, the government offered no proof that Macie actually contacted Best as suggested in the hearsay statement, whether by phone records, testimony, or any other means. Best

denied ever receiving such a call or contact. The only "independent evidence" connecting Macie's statement of intent with Best's actions was the similarity of Best's and Macie's cost-allocation memos.

The District Court allowed the government to introduce the hearsay statement as evidence of Best's future conduct, namely that Best met with Macie (presumably by phone), and that during that meeting, Best heard about the fraud and formed a criminal intent. App. 34a.

As a result of the admission of the hearsay statement, Best was convicted of one count of aiding and abetting a Medicare fraud perpetrated by the codefendant, Macie. Best moved for a judgment of acquittal or, in the alternative, for a new trial. The District Court denied the motion on July 25, 2000. See *United States v. Best,* 70 F. Supp.2d 129 (N.D.N.Y. 1999). App. 18a. Best timely appealed to the Second Circuit.

The Second Circuit affirmed the conviction, based upon its expansive interpretation of this Court's ruling in *Mutual Life Insurance Company v. Hillmon*, 145 U.S. 706 (1892). Specifically, the Second Circuit held that a declarant's out-of-court statement of intent is admissible in evidence against a person other than the declarant if there is independent evidence that connects the declarant's statement with the non-declarant's activities. *See United States v. Best*, 219 F.3d 192, 198-199, App. 9a (2d Cir. 2000) (citing *United States v. Delvecchio*, 816 F.2d 859, 863 (2d Cir. 1987); *United States v. Nersesian*, 824 F.2d 1294, 1325 (2d Cir.), cert. denied, 484 U.S. 957 (1987); *United States v. Badalamenti*, 794 F.2d 821, 825-26 (2d Cir. 1986); *United States v. Sperling*, 726 F.2d 69, 73-74 (2d Cir.), cert. denied, 467 U.S. 1243 (1984); *United States v. Cicale*, 691 F.2d 95, 103 (2d Cir. 1982), cert. denied, 460 U.S. 1082 (1983)). The Second Circuit relied upon the similarity of Best's

and Macie's memos as the "independent evidence" needed to admit the hearsay statement against Best.

Best filed a timely petition for rehearing. The Second Circuit denied the petition on September 19, 2000. App. 35a.

REASONS FOR GRANTING THE PETITION

This Court should grant review in this case and reverse the Second Circuit's aberrant interpretation of Federal Rule of Evidence 803(3),[2] the so-called "state of mind" exception to the hearsay rule. The Second Circuit's interpretation allows admission of hearsay evidence concerning the intent of the declarant to prove the subsequent conduct of a third-party non-declarant, whenever there is *any* evidence—even weak and wholly speculative evidence—connecting the statement with such later conduct. Even if this Court determines that there is no *per-se* prohibition of such hearsay evidence, the instant case presents the Court with an unusual opportunity to set meaningful federal standards concerning the conditions under which such hearsay evidence may be admitted.

The Second Circuit's ruling means that a declarant's statement of intent can be used to prove subsequent actions of a third party even when the corroborating evidence is of such small probative value (as to those actions) as to be almost meaningless. That ruling conflicts with rulings of the the First and Fourth Circuits, and conflicts with the House Judiciary Committee's stated intent that the 803(3) exception be limited

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[2] Hearsay testimony is generally inadmissible in a federal trial. Fed.R.Evid. 802 (the "hearsay rule"). App. 42a. Rule 803 enumerates several exceptions to the hearsay rule, including the state-of-mind exception. *See* Rule 803(3). App. 43a.

to proving subsequent actions of the *declarant only*. This Court should grant review and reverse the Second Circuit's conflicting ruling and set a uniform national standard on this important issue affecting a defendant's right to receive a fair trial.

I.

THIS IS AN IMPORTANT ISSUE OF LAW THAT NEEDS TO BE RESOLVED BY THE SUPREME COURT

A. Hearsay Evidence Concerning the Declarant's Intent is Inherently Unreliable When Used to Prove Subsequent Conduct of a Third Party

Many judges and commentators have generally—and understandably—expressed misgivings about using state-of-mind hearsay evidence to prove the subsequent conduct of a third-party non-declarant. *See, e.g., Johnson v. Chrans*, 844 F.2d at 485-86 (noting a "clear distinction between the reliability of out-of-court statements as proof of a declarant's state of mind and the reliability of such statements as proof of subsequent conduct by someone other than the declarant" and noting that Illinois law reflects a judgment that the unreliability of hearsay evidence is acceptable only where the *declarant's* state of mind is directly relevant); *People v. Alcalde*, 24 Cal.2d 177, 189, 148 P.2d 627, 633 (1944)(Traynor, J., dissenting)("A declaration as to what one person intended to do, however, cannot safely be accepted as evidence of what another probably did"); Maguire, *The* Hillmon *Case—Thirty-three Years After*, 38 Harv.L.Rev. 709, 717 (1925)("It is not customary to accept one man's extrajudicial assertions as evidence of another's mental state"); 4 J. Weinstein & M. Berger, WEINSTEIN'S

EVIDENCE, par 803(3), pp. 803-119 (noting that "the judiciary has been extremely circumspect about relying on [the federal state-of-mind exception] when the action of a person other than the declarant is involved"). *Cf. Shepard v. United States*, 290 U.S. 96, 105-06, 54 S. Ct. 22, 26 (1933)(Cardozo, J.) ("Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored").

The reason for such criticism is straightforward: out-of-court statements of intent are inherently unreliable to prove subsequent conduct of a third-party non-declarant, as the non-declarant's intent and that of the declarant are distinct and may be totally unrelated. Ordinarily this would not present a problem, as courts would naturally tend to exclude such use of extra-judicial statements of intent. The problem arises, however, where the declared intent involves interacting with the defendant. Then, there is a temptation to admit the evidence to show that the defendant participated with the declarant in the latter's schemes. Jurors, who are uninitiated in the dangers inherent in hearsay evidence in the first instnace—hence the need for the hearsay rule—are especially poorly equipped to discount the value of such evidence when used against a non-declarant. Nevertheless, as the below sections of this Petition demonstrate, some courts have yielded to the temptation to admit such evidence, with the result that many defendants in those jurisdictions are denied a fair trial. It is therefore vitally important that this Court set uniform and fair standards governing the conditions under which state-of-mind hearsay evidence may properly be admitted to prove the subsequent conduct of a third-party non-declarant.

B. Setting the Boundaries of Rule 803(3)'s Exception to the Hearsay Rule is Necessary to Eliminate the Conflict that Presently Exists Among Lower Courts on this Issue

The House Judiciary Committee Report on Rule 803(3) states that the "Committee intends that the Rule be construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, 295-300 (1892), so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person." H.R.Rep. No. 650, 93d Cong., 1st Sess. 13-14 (1973), U.S. Code Cong. & Admin. News 1974, p.7051. The Fourth Circuit has recognized that this limitation inheres in Rule 803(3). *See United States v. Jenkins*, 579 F.2d 840, 843 (4th Cir. 1978). The First Circuit also appears to have recognized the limitation. *See Gual Morales v. Hernandez Vega*, 579 F.2d 677, 680 n.2 (1st Cir. 1978).

The Advisory Committee's Note to Rule 803(3) states that "the rule of *Mutual Life Insurance Co. v. Hillmon*, allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed." *See* Fed.R.Evid. 803(3) Advisory Committee's Note, reprinted in Eric D. Green & Charles R. Nesson, FEDERAL RULES OF EVIDENCE 166 (1992). Accordingly, it appears, at least superficially, that the congressional intent is unclear, as the Judiciary Committee purported to "limit" the *Hillmon* doctrine while the Advisory Committee wanted to leave it undisturbed.

This apparent conflict in the legislative history has caused some courts to disregard the legislative history altogether, *see, e.g., United States v. Houlihan*, 871 F.Supp. 1495, 1498-99 (D. Mass. 1994)(specifically disregarding the

legislative history because of the conflict of the two reports); *United States v. York*, 1987 WL 5953, at *7 (N.D.Ill. 1987) ("[B]ecause of the conflicting statements of legislative intent, it is unclear whether Rule 803(3)" allows the hearsay statement of a declarant to prove the future conduct of a third party), while other courts cite only that portion of the history which supports the holding they wish to reach, *e.g.*, *United States v. Jenkins*, 579 F.2d 840, 843 (4th Cir. 1978)(citing only the House Judiciary Committee Report to conclude that Congress directed that Rule 803(3) be construed so that statements of intent would not be admissible to prove the future conduct of a non-declarant); *United States v. Best*, 219 F.3d 192, 198, App. 9a (2d Cir. 2000)(citing only the Advisory Committee Note to conclude that Congress intended that Rule 803(3) leave the *Hillmon* doctrine intact).

Because of this confusion and selective citation to legislative history, there are now two types of circuit splits on this topic. The first concerns whether Rule 803(3) can ever be used to admit hearsay state-of-mind testimony of future intent against a non-declarant. The First and Fourth Circuits have stated that it cannot, *Jenkins*, *supra*; *accord Gual Morales v. Hernandez Vega*, 579 F.2d 677, 680 n.2 (1st Cir. 1978), while the Second and Ninth Circuits have reached the opposite conclusion, *see Delvecchio*, *supra*; *United States v. Astorga-Torres*, 682 F.2d 1331, 1335-36 (9th Cir. 1982). The second type of circuit split occurs among those courts that fall into the latter camp—that is, those that allow such testimony under some circumstances. These courts are divided on the question of whether independent evidence connecting the declarant's statement with the non-declarant's conduct is a prerequisite to admitting such hearsay testimony in the first instance, with the Second Circuit holding that it is, *see Nersesian*, *supra*; *accord York*, *supra*, and the Ninth Circuit concluding that it is not, *see Astorga-Torres*, *supra*; *see generally United States v. Pheaster*,

544 F.2d 353, 374-80 (9th Cir. 1976), cert. denied sub nom. *Inciso v. United States*, 429 U.S. 1099, 97 S. Ct. 1118, 51 L. Ed. 2d 546 (1977)(applying *Hillmon* prior to enactment of Rule 803(3) to admit hearsay statement that declarant was going to meet "Angelo" to prove Angelo met the declarant). *See also Johnson v. Chrans*, 844 F.2d 482, 486 n.4 (7th Cir. 1988)(collecting cases and noting the "disagreement on the proper boundaries of the state-of-mind exception" embodied in Rule 803(3)); *Houlihan*, 871 F.Supp. at 1499-1500 (collecting cases).

In sum, the federal cases are in disarray on the question of whether, and under what circumstances, the 803(3) exception to the hearsay rule should be applied to admit hearsay evidence of the declarant's intent to prove the subsequent conduct of a third-party non-declarant.[3] This Court should grant review in the instant case and clear away the fog by setting a uniform federal standard on this important issue affecting a defendant's right to receive a fair trial.

C. The Second Circuit's Holding that Rule 803(3) Renders Statements of Intent by a Declarant Admissible to Prove Subsequent Actions of a Third Party is Contrary to the Intent of Congress

As noted, the House Judiciary Committee Report on Rule 803(3) and the Advisory Committee Note are in *apparent* conflict, and such appearance of conflict has led to conflicting rulings in lower federal courts.[4] Upon close analysis, however,

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[3] Here, "third party" indicates that the actor was neither the declarant nor the person to whom the out-of-court declaration was made.

[4] To review: the Judiciary Committee sought to "limit" application of Rule 803(3) out-of-court statements of intent to prove subsequent actions of the declarant only, while the Advisory Committee intended that the *Hillmon*

the two statements of legislative intent are actually in harmony. For one, the Advisory Committee never stated that its understanding of the *Hillmon* doctrine includes the principle that statements of intent are admissible against third parties. Indeed, to the contrary, the precise wording of the Note militates against such a construction. The Note states that the *Hillmon* rule, "allowing evidence of intention as tending to *prove the doing of the act intended* is, of course, left undisturbed" (emphasis added). Thus, the Advisory Committee referenced the specific aspect of the *Hillmon* doctrine pursuant to which a statement of intent may properly be used to prove "the doing of the act intended." Because the state-of-mind exception only encompasses utterances of the *declarant's* state of mind, and not statements by a declarant regarding someone else's state of mind, *see* Fed.R.Evid. 803(3), the "act intended" referenced in the Advisory Committee's Note can only mean the act intended *by the declarant*. Thus, if the evidence at issue tends to prove the doing of such act, it must of necessity be directed to the doing of the act *by the declarant*. Therefore, even if the Hillmon doctrine is left "undisturbed" to the extent it allows introduction of statements of intent to prove the doing of the act intended, such extent reaches no farther than using the declarant's statement of intent to prove *the declarant's* own subsequent conduct.

Additionally, a close reading of the *Hillmon* opinion reveals that the *Hillmon* doctrine, properly understood, does not include admission of statements of intent against third parties. *Hillmon* was a civil case in which a widow sued three insurance companies to collect on her dead husband's life insurance policies. She claimed that her husband died of a gunshot wound at a place called Crooked Creek after traveling there from Wichita. The insurance companies defended the suit by

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doctrine be left "undisturbed."

contending that the dead body at issue was not that of the plaintiff's husband, Mr. Hillmon, but instead belonged to one Walters. The companies sought to introduce two letters written by Walters—one to his sister, the other to his fiancé—stating his intent to travel from Wichita with Mr. Hillmon to "parts unknown."

The trial court excluded the two letters, but this Court reversed, holding that the letters were competent evidence that Walters acted in conformance with his previously-stated plans to travel from Wichita with Hillmon. 145 U.S. at 295-296. The *Hillmon* opinion does not, however, speak to the issue of whether the letters were admissible to prove the subsequent actions of any third party, including Mr. Hillmon. Indeed, the companies understandably did *not* seek to prove that Mr. Hillmon was at Crooked Creek on the night of the shooting; to do so would have bolstered the plaintiff's case.[5] Accordingly, the letters were not allowed into evidence to prove the subsequent actions of Mr. Hillmon or any other third party. They were only introduced to prove the subsequent actions of declarant Walters.[6]

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[5] Even if the insurance companies claimed that Mr. Hillmon killed Walters at Crooked Creek, then all parties agreed Mr. Hillmon was at Crooked Creek: the widow claimed he was killed there, and the insurance companies contended he killed Walters there. Hence, under no scenario did the insurance companies seek to *prove* Mr. Hillmon had traveled there.

[6] This Court did state, in dicta, that the letters made it more probable that Walters traveled in accordance with his intent to do so—and that he traveled with Mr. Hillmon—than if there had been no proof of such intention. 145 U.S. at 295-96, 12 S. Ct. at 912-913. The Court also quoted from *Hunter v. State*, 40 N.J.Law 495, 534, 536-538, a decision of the New Jersey Court of Errors and Appeals, in which that court approved admission into evidence of a letter stating an intent to travel with the defendant, to prove the defendant subsequently traveled with the declarant. As a result, some lower courts have concluded that this Court, in *Hillmon*, held that admission of out-of-court statements of intent can properly be used to prove subsequent actions of a non-declarant. *See, e.g., Houlihan*, 871 F.Supp. at 1498; *Brown*

Consequently, it does not matter whether the *Hillmon* doctrine is "left undisturbed" or "limited" in the manner intended by the Judiciary Committee. Either way, it only stands for the proposition that statements of intent are admissible to prove the subsequent conduct of the declarant—and only the declarant—in conformity with the stated intent. Therefore, Congress never expressed any intent that 803(3) be interpreted to allow admission of hearsay evidence of intent to prove the future actions of a third-party non-declarant.

This Court should grant review and reverse the decision of the Second Circuit, vacate the conviction and remand the case to the District Court with instructions to enter a judgment of acquittal, or in the alternative, grant Best a new trial.

D. The Second Circuit's Holding that Rule 803(3) Renders Statements of Intent by a Declarant Admissible to Prove Subsequent Actions of a Third Party is Theoretically Untenable

The state of mind exception codified in Fed.R.Evid. 803(3) provides that hearsay evidence is admissible if it bears upon the state of mind of the declarant. When this exception was developed at common law, it was originally only available where the declarant's state of mind was an issue in the case. The *Hillmon* doctrine is a theoretically awkward and questionable expansion of this exception, whereby evidence of

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v. Tard, 552 F.Supp. 1341, 1352 (D.N.J. 1982). Such is not the case, however, as the *Hillmon* court merely held that the letters at issue were competent evidence regarding the question in controversy, namely, whether *Walters*—the declarant—had traveled Crooked Creek. That Mr. Hillmon also went there was not something the insurance companies sought to prove.

the declarant's stated plans is used, not to prove his state of mind, but inferentially to prove his later performance of an act. *See United States v. Pheaster*, 544 F.2d 353, 376 (1976) (*Hillmon* creates an "extraordinary doctrine," "fundamentally different" from the norm, as "it does not require that the state of mind of the declarant be an actual issue").

Recognizing the awkwardness, this Court has expressed reluctance to apply *Hillmon* beyond the facts of that case. In *Shepard, supra*, this Court stated that the *Hillmon* doctrine marked the "high-water line beyond which courts have been unwilling to go." 290 U.S. at 105, 54 S. Ct. at 26. One might say that Justice Cardozo was attempting to build a dike to contain the *Hillmon* doctrine, and that courts must be particularly vigilant to ensure that the lake of admissible hearsay does not rise so high as to spill over that dike and flood the hearsay rule out of practical existence. Use of the *Hillmon* doctrine to admit hearsay against a third-party non-declarant constitutes a spilling over the dike, and indeed, such was the very result feared by the commentators as a logical extension of the *Hillmon* case. *See* Seligman, *An Exception to the Hearsay Rule*, 26 Harv. L. Rev. 146 (1912); Payne, *The* Hillmon *Case Revisited*, 41 Va. L. Rev. 1011, 1036 (1955).

The court in *United States v. Brown*, 160 U.S. App. D.C. 190, 490 F.2d 758 (1974), provided inferential support for the proposition urged by petitioner Best. The court in *Brown* dealt with the issue of whether a victim's statement of fear of the defendant can be admitted to prove the defendant's subsequent conduct. The court noted that the principal danger is that the jury will consider the victim's statement of fear as reflecting on the defendant's state of mind rather than the victim's. 490 F.2d at 766. *See People v. Purvis*, 56 Cal.2d 93, 13 Cal.Rptr. 801, 804, 362 P.2d 713, 716 (1961)("It may be that an inference as to the victim's conduct can be drawn from

the victim's state of mind, but certainly no permissible inference can be drawn therefrom as to the defendant's character or actions"). The *Brown* court's criticism of such rule might well (as the *Pheaster* court noted, 544 F.2d at 380 n.18) apply to the application of *Hillmon* as against third-party non-declarants:

> Such an approach violates the fundamental safeguards necessary to the use of such testimony [citation omitted]. Through a circuitous series of inferences, the court reverses the effect of the statement so as to reflect on the defendant's intent and actions rather than the state of mind of the declarant (victim).

490 F.2d at 771.

Instantly, the trial court went beyond the bounds of the already-infirm *Hillmon* doctrine, bringing its shaky legal foundation into sharp relief. *Hillmon* could have been used in this case to admit Gastle's hearsay to prove Macie's state of mind in making the utterance, or to prove that Macie made a call to Best.[7] This use would tend to prove that Macie acted

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[7] The Government might argue that, as with any planned meeting, for Macie to have carried out his plan would necessarily have involved Best's participation. Such is not the case presently, however. For one, the statement itself was somewhat ambiguous (e.g., Macie's stated intent to call "Jim" could have referred to another person besides Best). Also, even if Macie had placed a phone call to Best, there is no guarantee that Best would have participated. There may have been no answer, or the line may have been busy. Even if there were an answer, Macie may have left a message with Best's secretary or on Best's answering machine. Even if Best had answered and spoken with Macie, and even if they spoke about cost allocation memos, Macie's "taking care of it" (per his declared intent) could have entailed duping Best into unwittingly aiding Macie's scheme, without Best knowing anything fraudulent was taking place, thus precluding a "meeting" of the minds between Macie and Best. Hence, for Macie to have carried out his plan would not necessarily have involved Best in the fraud.

with criminal intent, and committed an act in furtherance of his plan. The use here, however, went well beyond those bounds. The exception was employed not to prove Macie's intent or actions, but rather to prove Best's conduct *and intent*. Specifically, the hearsay was admitted to prove that Best met with Macie (presumably by phone), and that during that meeting, Best heard about the fraud and formed a criminal intent to act as an aider and abettor in furtherance of Macie's plan. Therefore, the hearsay use permitted in the present case is of a different character than statements of intent to meet the defendant in person for some illegal purpose, where eyewitness testimony confirms that such meeting did in fact take place.

As the *Pheaster* court acknowledged, the *Hillmon* doctrine has come under sharp criticism from "very distinguished quarters, both judicial and academic." *Pheaster*, 544 F.2d at 380 n.18. The criticism is especially well taken where, as here, the extra-judicial utterance was ambiguous, the "corroborative" evidence was weak, and the prejudice to the defendant far outweighed any legitimate use of the declaration.

II.

THIS CASE PRESENTS AN IDEAL VEHICLE TO SET THE BOUNDARIES OF RULE 803(3)'S EXCEPTION TO THE HEARSAY RULE, AS THERE WAS SOME CORROBORATING EVIDENCE, BUT IT WAS OF SLIGHT PROBATIVE VALUE

In the present case, an extra-judicial statement by Macie that he would "call Albany and talk to Jim and take care of it with the Albany division" was used to prove that "Jim" (petitioner James Best) subsequently conspired with Macie over the phone to commit Medicare fraud. The district court found that the similarity of Macie's and Best's memos provided

the independent corroborating evidence required by Second Circuit precedent to allow the hearsay statement in against Best under Rule 803(3). *See* App. 34a.

This scenario is, to be sure, somewhat unusual in its features, in that there was no eyewitness testimony that such a phone call ever took place, nor did the Government introduce any telephone records, or question Macie on cross-examination whether he had made such a call. In the line of precedent upon which the Second Circuit relied, by contrast, the corroborating evidence consisted of eyewitness testimony that a meeting took place, and the contested hearsay statement was introduced to prove the nature of that meeting.

Ironically, it is the present case's distinctiveness, relative to the type of "independent corroborating evidence" involved, that provides this Court with an opportunity to set particularly helpful standards for lower courts regarding the circumstances under which statements of intent can properly be admitted to prove subsequent actions of third parties pursuant to Rule 803(3). The reason becomes clear when one considers the Court's possible dispositions. First, the Court could settle on a *per-se* prohibition, if it determines that Congress intended to limit the 803(3) exception to proof of subsequent actions of the declarant only. In that event, the Court would reverse the Second Circuit's decision so long as it found the error prejudicial.

Second, the Court could determine that the 803(3) exception is not so limited, but is instead broad enough to cover extra-judicial statements of intent to prove subsequent conduct of a non-declarant, but only when there is independent corroborative evidence which meets some objective standard of reliability. In that event, the Court might wish to provide the lower courts with guidance concerning what constitutes an

acceptable level of reliability. Here is where the advantage of granting review in the present case becomes apparent. In other cases—where there is eyewitness testimony or data records confirming that such a call or meeting took place—it would be difficult for this Court to set such standards apart from dicta, as such corroborating evidence would be at the "highly reliable" end of the spectrum. Hence, beyond holding that the corroborating evidence did meet the minimum threshold of reliability required for introduction of the hearsay testimony, this Court would likely leave to another day the question of whether some other form of (less reliable) corroborative evidence also met the minimum threshold.

In the present case, by contrast, the reliability of the evidence—*to wit*, the similarity of Best's and Macie's memos—falls somewhere in the middle of the spectrum, between "no independent corroborating evidence" and "highly reliable independent corroborating evidence." Accordingly, this Court could use the instant case to define precisely *where* between those two extremes the minimum threshold lies.

CONCLUSION

For the reasons expressed above, petitioner James Best respectfully asks this Court to grant the petition for a writ of certiorari to the Second Circuit.

Respectfully submitted,

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December 18, 2000

UNITED STATES of America, Appellee,

v.

James BEST, Defendant-Appellant.

Docket Nos. 99-1646(L), 99-1688

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

219 F.3d 192

July 25, 2000, Decided

SUBSEQUENT HISTORY: Petition for Rehearing denied September 19, 2000.

PRIOR HISTORY: Appeal from conviction in United States District Court for the Northern District of New York, case no. 97-CR-0428. Judgment entered October 21, 1999. District Court's decision of September 22, 1999, denying Best's motion for judgment of acquittal or, in the alternative, a new trial, reported at 70 F.Supp.2d 129.

DISPOSITION: Affirmed

COUNSEL: STEVEN D. CLYMER, Assistant United States Attorney, Syracuse, New York (Daniel J. French, United States Attorney for the Northern District of New York, Syracuse, New York, on the brief), for Appellee.

BROWN, PINNISI & MICHAELS, Ithaca, New York (Michael D. Pinnisi, Peter M. Stein, Ithaca, New York, of counsel), filed a brief for Defendant-Appellant.

JUDGES: Before: KEARSE, CARDAMONE, and WALKER, Circuit Judges.

OPINION BY: KEARSE, Circuit Judge:

Defendant James Best appeals from a judgment of conviction entered in the United States District Court for the Northern District of New York following a jury trial before Thomas J. McAvoy, then-Chief Judge, convicting him of aiding and abetting a fraud against the United States, in violation of 18 U.S.C. §§ 1031 and 2, and sentencing him principally to three years' probation. On appeal, Best contends (1) that the trial court improperly admitted in evidence a codefendant's out-of-court statement that the codefendant intended to ask Best to create a fraudulent document, (2) that the evidence was insufficient to support his conviction, and (3) that he received ineffective assistance of counsel. Finding no merit in his contentions, we affirm.

I. BACKGROUND

The present prosecution of Best and his codefendant Jerome Maciejewski arose out of the 1992 operations of WholeHealth Insurance Network, Inc. ("WIN" or the "Company"), a private insurance company in New York State that had a contract with the United States Health Care Financing Administration ("HCFA"), which administers the Medicare program. WIN's contract with HCFA ("the Medicare contract") called for WIN to process certain Medicare claims, respond to beneficiary and provider requests for information, and deal with requests for reviews and hearings. The contract prohibited WIN from using Medicare funds for its private business costs.

In a six-count indictment, Maciejewski was charged principally with causing fraudulent claims to be submitted to

HCFA at various times in 1992; Best was charged in one count with aiding and abetting the submission of such fraudulent claims beginning in May 1992. Best and Maciejewski were tried jointly, and each defendant was convicted on the counts against him. Only Best's conviction is at issue on this appeal. The evidence at trial, taken in the light most favorable to the government, showed the following.

WIN's operations were divided among three divisions, headquartered respectively in Albany, Buffalo, and Binghamton. Each division had a "professional relations" department that served as a liaison between the Company and the health care providers who submitted claims for reimbursement. WIN's Medicare business was handled in its Binghamton division, which was also known as its "Upstate Medicare Division"; the Company's Albany and Buffalo divisions were involved only in private insurance, not Medicare. The employees in the Albany division's professional relations department were not trained to do Medicare-related work and did not do such work. Best was a senior vice president of the Company and was chief operating officer of the Albany division.

In April 1992, Maciejewski became the Company's chief operating officer, with responsibility for all three divisions. Because WIN was having serious financial difficulties, Maciejewski began to cut corporate costs and sought other sources of funds, including increased payments from HCFA.

Evidence as to Maciejewski's plans for obtaining increased payments from HCFA was introduced at trial largely through the testimony of Robert Gastle, an employee in the Company's finance department who was responsible for the Company's Medicare budgeting and reporting process. In that capacity, Gastle reported to Martin Benz, who reported to David Voss,

the Company's vice president of finance. Gastle testified that in May 1992, Maciejewski instructed him to inform Voss that Maciejewski wanted 50 percent of the expenses of the Buffalo division's professional relations department to be reallocated to Medicare, retroactively to January 1992. As a result of such an increased allocation, the Buffalo division would receive more money from HCFA on the Medicare contract, which would help fund WIN's non- Medicare expenses. Maciejewski said he would have the Buffalo professional relations representatives distribute Medicare materials at meetings with the western New York provider community in order to justify the allocation; but he did not indicate that the representatives had been making such distributions since January 1992, and in Gastle's view such distributions could not justify allocating 50 percent of that department's expenses to the Medicare contract.

Gastle relayed Maciejewski's instructions to Voss, but Voss balked at carrying them out unless they were in writing. When Gastle reported Voss's response to Maciejewski, Maciejewski called Voss "wimpy" and expressed displeasure at being forced to put his instructions in writing. The government introduced evidence that Maciejewski nonetheless promptly prepared a Medicare reallocation memorandum to Voss, instructing that 50 percent of the Buffalo division's professional relations department expenses be reallocated to the Medicare contract, retroactively to January 1, 1992. Maciejewski's secretary testified that she typed the memorandum to Voss, at Maciejewski's request, on May 6, 1992. The memorandum was backdated to February 3, 1992, and was apparently received by Voss on June 3, 1992; however, the secretary testified that the word-processing program she used showed that the document was generated on May 6. Maciejewski's memorandum stated as follows:

> As you know, we have recently discussed the Professional Relations (PR) activity that Buffalo is performing for our

> Medicare division. With this in mind, it seems reasonable to allocate 50 percent of the PR cost centers to the Medicare division. This activity was reinstituted on January 1, 1992, therefore, this allocation should be retroactive to that date. If you have any questions, please contact me.

(Memorandum from Jerry Maciejewski to David Voss, dated "February 3, 1992.")

Over Best's objection, Gastle further testified that when he reported to Maciejewski Voss's refusal to implement the Medicare reallocation without written instructions, "Mr. Maciejewski told [Gastle] that he would call Albany and talk to Jim and take care of it with the Albany division" (Transcript ("Tr."), at 689). The government introduced evidence that Maciejewski and James Best were friends; that beginning on or about May 13, Maciejewski attended a series of meetings with Best in Albany and had daily contact with him; and that sometime between May 13 and May 15, Best wrote Voss instructing that 50 percent of the Albany division's professional relations department expenses be reallocated to the Medicare contract, retroactively to January 1, 1992. Although Best's Medicare reallocation memorandum was backdated to February 18, 1992, Voss received it on May 15. Best's secretary testified that Best had asked her to type the memorandum during the second week of May; and Best testified that he wrote the memorandum within a day or two of his May meetings with Maciejewski. The Best memorandum stated as follows:

> Per this morning's conversation, please make the necessary adjustment in the cost allocation system to properly credit this department for its Medicare involvement. Since the first of the year, Jerry Maciejewski has asked us to assist the Medicare B Operation by having our Professional Relations Representatives disseminate various medicare information to our providers when they are making routine provider contacts and calls.

> Therefore, would you please allocate 50% of the Department to the Binghamton Division retroactive to January 1, 1992.

(Memorandum from James W. Best to David Voss, dated "February 18, 1992.")

In June 1992, following the instructions received in the Maciejewski and Best memoranda, Gastle had the documentation prepared and made the journal entries necessary to implement the retroactive increases in the Medicare contract allocations. As a result of the change in allocation, a total of $459,992 of WIN's professional relations costs for the two non-Medicare divisions was falsely allocated to the Medicare contract between January and September 1992, including $164,780 for the Albany division, for which Best was responsible.

Best testified at trial in his own defense. While acknowledging that it would have been improper to order the reallocation of Albany division expenses to the Medicare contract unless its employees were actually doing Medicare work, Best stated that he believed at the time he wrote the memorandum that the professional relations employees in the Albany division were in fact doing Medicare work. Further, Best denied ever having discussed the Medicare contract allocation with Maciejewski. He testified that he had sent his memorandum to Voss because he was instructed to do so by Voss. He testified that Voss told him to send the memorandum, Voss provided the language, and Voss instructed him to backdate it. Best also stated that he had believed Voss was involved in manipulating financial data used to determine insurance rates; but, Best testified, he had "[a]bsolutely" complied with Voss's instructions without question. (Tr. 2196-97.) Best conceded that, in the Company hierarchy, he was senior to Voss.

The jury returned a verdict of guilty. The district court denied motions by Best for a judgment of acquittal and imposed a sentence of probation as indicated above. This appeal followed.

II. DISCUSSION

On appeal, Best contends principally (1) that the trial court improperly allowed Gastle to testify that Maciejewski said he intended to ask Best to send Voss a Medicare reallocation memorandum for the Albany division, and (2) that the evidence as to his knowledge of Maciejewski's scheme to defraud the government was insufficient to support his conviction of aiding and abetting. Best also contends that his Sixth Amendment right to effective assistance of counsel was violated by his counsel's performance. Finding no merit in his contentions, we affirm the judgment.

A. Maciejewski's Statement of Intent To Call Best

The government informed defense counsel prior to trial of its intent to offer in evidence Gastle's testimony that in May 1992 Maciejewski had stated that he would speak to Best about instructing Voss to make reallocations to the Medicare contract for professional relations department expenses of the Albany division. The government argued that Maciejewski's statement expressed an intent to perform a future act and thus fell within the exception to the hearsay rule set out in Fed.R.Evid. 803(3) ("statement of the declarant's then existing ... intent" is not excluded by the hearsay rule). Best argued that Maciejewski's statement should not be admitted against Best, arguing that

> the only time that you can use 803(3) against a nondeclarant ... is if there is independent evidence corroborating that the intent actually took place. For example, if they say I'm going to have a meeting with so and so. There has to be eyewitnesses that the meeting later took place if they want to

> use that statement against a co-defendant who is a nondeclarant.

(Tr. 5.) Best argued that "the only connection" between Best and Maciejewski "is going to be this phone call," in which "anything could have been discussed," and that there would be insufficient corroboration to permit introduction against Best of Maciejewski's statement of intent to call Best. (Tr. 9.) The government argued that the statement was admissible against Best not to show conduct by Best, but rather to show that Maciejewski proceeded to speak to Best as Maciejewski had told Gastle he would; the government argued that there was sufficient independent evidence of Best's own conduct that corroborated the proposition that Maciejewski had indeed followed through on his intent to speak to Best with regard to the fraudulent allocations.

Following that pretrial colloquy, the district court reserved decision. During the trial, the court concluded that the Gastle testimony as to Maciejewski's statement of intent to call Best was sufficiently corroborated and hence would be admitted:

> [Best's memorandum] contained substantially the same information that the Maciejewski memoranda contained. It was backdated to the same time. It was issued contemporaneous, almost with the time the statement was alleged to be made. So the Court thinks that's sufficient corroborative evidence to ... allow to be admitted against Best. There has to be corroborative evidence. That's clear. The Court thinks that's sufficient.

(Tr. 328.)

In challenging this ruling, Best contends that the statement was improperly offered to prove his conduct and intent, that there was insufficient corroboration of the statement, and that the court's view of the timing of the Best and Maciejewski memoranda was mistaken. We disagree.

A declarant's out-of-court statement as to his intent to perform a certain act in the future is not excludable on hearsay grounds. *See* Fed.R.Evid. 803(3) ("[a] statement of the declarant's then existing state of mind ... such as intent" is "not excluded by the hearsay rule"). If relevant, such a statement may be introduced to prove that the declarant thereafter acted in accordance with the stated intent. *See, e.g., Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, 295-96, 12 S.Ct. 909, 36 L.Ed. 706 (1892); *see also* Fed.R.Evid. 803 Advisory Committee Note to Paragraph (3) (1972) ("The rule of *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706, ... allowing evidence of intention as tending to prove the doing of the act intended, is ... left undisturbed.").

In several cases, this Court has discussed whether a declarant's out-of-court statement of intent was admissible in evidence against a person other than the declarant. *See, e.g., United States v. Delvecchio*, 816 F.2d 859, 863 (2d Cir.1987); *United States v. Nersesian*, 824 F.2d 1294, 1325 (2d Cir.), cert. denied, 484 U.S. 957, 108 S.Ct. 355, 98 L.Ed.2d 380 (1987); *United States v. Badalamenti*, 794 F.2d 821, 825-26 (2d Cir.1986); *United States v. Sperling*, 726 F.2d 69, 73-74 (2d Cir.), cert. denied, 467 U.S. 1243, 104 S.Ct. 3516, 82 L.Ed.2d 824 (1984); *United States v. Cicale*, 691 F.2d 95, 103 (2d Cir.1982), cert. denied, 460 U.S. 1082, 103 S.Ct. 1771, 76 L.Ed.2d 344 (1983). In each of these cases, we concluded that admissibility turned on whether there was independent evidence that connected the declarant's statement with the non-declarant's activities.

In *United States v. Cicale*, for example, the declarant on several occasions told an undercover agent that he was about to meet with his drug "source," to whom he never referred by name, at specific locations such as "the guy's house" or "at the restaurant where he's at" "right now." 691 F.2d at 103 n.2.

Soon after each such statement, the declarant was either seen with Cicale or seen arriving at Cicale's home. *See* 691 F.2d at 103. We concluded that the observations of Cicale meeting with the declarant promptly after the declarant stated he was about to meet with his "source" were independent evidence that Cicale was the "source" referred to by the declarant and that Cicale had engaged in narcotics trafficking.

Following the reasoning of *Cicale*, we held in *United States v. Sperling* that a declarant's statement that she was going to meet with her drug source at noon that day was admissible to prove Sperling's participation in a drug conspiracy where law enforcement agents observed Sperling meeting with the declarant at the appointed time, and no one else met with the declarant from 11:30 a.m. to 2 p.m. *See* 726 F.2d at 73-74. In *United States v. Delvecchio*, an informant stated that he was going to meet with defendants Delvecchio and Amen to set up a drug transaction. A meeting ensued, and law enforcement agents observed Amen drive to the meeting site and get out of the car and approach the informant. However, the passenger in the car never got out and the agents could not see his face. We held that the informant's statement was not admissible to prove that Delvecchio attended the meeting because there was no independent evidence that he had done so.

Corroboration of the nature of the transaction need not be eyewitness observations and may be provided by circumstantial evidence. Thus, in *United States v. Badalamenti*, the declarant stated that he would meet the defendant at a particular time and place to obtain a heroin sample; we held that there was sufficient corroboration to admit that statement against the defendant in light of the government's evidence that the defendant met the declarant at the location specified in the declarant's statement and that after the meeting, the declarant had samples of heroin. *See* 794 F.2d at 825-26.

In the present case, there was ample circumstantial evidence to corroborate the proposition that Best was the person Maciejewski said he would ask to prepare a Medicare reallocation memorandum for the Company's Albany division. Best's name is James, and Maciejewski said he would call "Jim"; Best and Maciejewski were friends, permitting the inference that it was not improbable that Maciejewski would refer to Best by nickname; and Maciejewski said he would have "Jim" take care of the matter with respect to the Albany division, and Best was in charge of the Albany division.

There was also ample independent proof that Maciejewski thereafter made such a request of Best. The record included evidence that Maciejewski made his statement to Gastle in early May; that Maciejewski thereafter wrote a memorandum on May 6 instructing Voss to make the fraudulent reallocations with respect to the Buffalo division; that on May 13, Maciejewski met with Best; and that Best, within a day or two of meeting with Maciejewski, wrote a memorandum to Voss with respect to the Albany division that was in substance identical to the memorandum written by Maciejewski. Best's conduct was proven not by Maciejewski's statement of what he would ask Best to do, but rather by the direct evidence of what Best did. We see no error in the district court's admission of Maciejewski's statement against Best.

B. Sufficiency of the Evidence

To convict a defendant on a theory of aiding and abetting, the government must prove that the underlying crime was committed by a person other than the defendant and that the defendant acted--or failed to act in a way that the law required him to act--with the specific purpose of bringing about the underlying crime. *See, e.g., United States v. Labat*, 905 F.2d

18, 23 (2d Cir.1990); *United States v. Wiley*, 846 F.2d 150, 154 (2d Cir.1988); *United States v. Zambrano*, 776 F.2d 1091, 1097 (2d Cir.1985). To prove that the defendant acted with that specific intent, the government must show that he knew of the proposed crime. *See, e.g., United States v. Pipola*, 83 F.3d 556, 562 (2d Cir.), cert. denied, 519 U.S. 869, 117 S.Ct. 183, 136 L.Ed.2d 122 (1996); *United States v. Di Stefano*, 555 F.2d 1094, 1103 (2d Cir.1977); *United States v. Gallishaw*, 428 F.2d 760, 763 (2d Cir.1970); *see also Nye & Nissen v. United States*, 336 U.S. 613, 620, 69 S.Ct. 766, 93 L.Ed. 919 (1949) (aiding and abetting theory supports liability when the defendant "consciously shares in" the underlying criminal act). To be culpable, the defendant need not know all of the details of the crime, *see, e.g., United States v. Grubczak*, 793 F.2d 458, 463 (2d Cir.1986), if the evidence shows that he "joined the venture, shared in it, and that his efforts contributed towards its success," *United States v. Wiley*, 846 F.2d at 154 (internal quotation marks omitted); *see also United States v. Aiello*, 864 F.2d 257, 263 (2d Cir.1988).

Here, the underlying crime was "knowingly execut[ing], or attempt[ing] to execute, any scheme or artifice with the intent ... to defraud the United States," 18 U.S.C. § 1031(a)(1), in connection with requests for Medicare contract payments. Best contends that the evidence was insufficient to show that he had the requisite knowledge. We disagree.

A defendant seeking to overturn a conviction on the ground that the evidence was insufficient bears a heavy burden. *See, e.g., United States v. Desimone*, 119 F.3d 217, 223 (2d Cir.1997), cert. denied, 525 U.S. 874, 119 S.Ct. 174, 142 L.Ed.2d 142 (1998); *United States v. Abelis*, 146 F.3d 73, 80 (2d Cir.), cert. denied, 525 U.S. 1009, 119 S.Ct. 527, 142 L.Ed.2d 437 (1998). The government's proof need not exclude every possible hypothesis of innocence, *see, e.g., United States*

v. Desimone, 119 F.3d at 223; *United States v. Malpeso*, 115 F.3d 155, 164 (2d Cir.1997), cert. denied, 524 U.S. 951, 118 S.Ct. 2366, 141 L.Ed.2d 735 (1998), and where there are conflicts in the testimony, we defer "to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence." *United States v. Morrison*, 153 F.3d 34, 49 (2d Cir.1998); *see, e.g., United States v. Miller*, 116 F.3d 641, 676 (2d Cir.1997), cert. denied, 524 U.S. 905, 118 S.Ct. 2063, 141 L.Ed.2d 140 (1998).

These principles apply whether the evidence being reviewed is direct or circumstantial. *See, e.g., Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Valenti*, 60 F.3d 941, 945 (2d Cir.1995); *United States v. Sureff*, 15 F.3d 225, 228 (2d Cir.1994). The jury is entitled to infer from circumstantial evidence that a party had knowledge of a particular fact despite the party's trial testimony denying such knowledge. *See, e.g., Smith v. California*, 361 U.S. 147, 154, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); *United States v. Villegas*, 899 F.2d 1324, 1338-39 (2d Cir.), cert. denied, 498 U.S. 991, 111 S.Ct. 535, 112 L.Ed.2d 545 (1990); *Young v. Abrams*, 698 F.2d 131, 135-36 (2d Cir.1983).

The weight of the evidence is a matter for argument to the jury, not a ground for reversal on appeal. *See, e.g., United States v. Roman*, 870 F.2d 65, 71 (2d Cir.), cert. denied, 490 U.S. 1109, 109 S.Ct. 3164, 104 L.Ed.2d 1026 (1989). Pieces of evidence must be viewed not in isolation but in conjunction. *See, e.g., United States v. Podlog*, 35 F.3d 699, 705 (2d Cir.1994), cert. denied, 513 U.S. 1135, 115 S.Ct. 954, 130 L.Ed.2d 897 (1995). We must reject the sufficiency challenge if, viewing all the evidence in the light most favorable to the prosecution, we conclude that "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis in original).

In the present case, we conclude that the evidence was sufficient to permit a rational juror to infer that Best knew of, and sought to contribute to the success of, Maciejewski's proposed fraud. Proof of the underlying fraudulent scheme was overwhelming. The evidence showed that Maciejewski wanted to reduce costs in order to help the Company and save his job; that he decided improperly to shift some unreimbursable costs onto the Medicare contract so that the government would pay for those costs; and that he sent a memorandum to Voss instructing Voss to make the fraudulent cost allocations and to make those allocations retroactive.

The proof that Best knowingly sought to assist in Maciejewski's fraudulent scheme was circumstantial but sufficient. The record included the evidence that Maciejewski asked Best to instruct Voss to reallocate 50 percent of the Albany professional relations expenses to the Medicare contract; that Best knew it would be improper to allocate private business costs to the Medicare contract without a valid reason; that Best's memorandum instructing Voss to implement that reallocation was sent shortly after Maciejewski met with Best; that Best's memorandum referred to instructions by Maciejewski; that Best's memorandum, in all significant particulars, matched the fraudulent memorandum that Maciejewski had written a week earlier, to wit, both memoranda were backdated to February, both ordered the allocation of precisely 50 percent of the professional relations costs to the Medicare contract, and both specified that the allocation should be retroactive to January 1, 1992; and that Best, who supervised the Albany professional relations department, had no basis for believing that the Medicare reallocation he ordered was legitimate when he wrote his

memorandum.

Although Best claimed that he had written his memorandum because he was instructed to do so by Voss, the jury was entitled to discredit that testimony as entirely implausible, given the evidence that Best was responsible for supervising the Albany professional relations department and would have been familiar with any change in the type of work done by his division, that Voss had no involvement in the operation of the professional relations department in Albany, and that Voss ranked lower in the Company than Best and had no authority over Best.

From the government's evidence, a rational juror could easily infer that Maciejewski and Best had discussed Maciejewski's fraudulent plan and that as a consequence of those discussions, Best wrote his memorandum for the purpose of contributing to the success of Maciejewski's fraudulent scheme.

C. The Claimed Ineffective Assistance of Counsel

Finally, Best contends that his trial counsel's representation was ineffective because he (a) failed to argue that Best's memorandum to Voss was written prior to Maciejewski's memorandum and (b) failed to call witnesses to vouch for Best's personal integrity and to corroborate his testimony as to "comptroller influence over cost-allocation memos, the lack of supervisory control by Best over the company comptroller, and frequent supervisor reliance upon subordinates for the accuracy of financial information" (Best brief on appeal at 33). These contentions need not detain us long.

To establish a claim of constitutionally ineffective assistance of counsel, a convicted defendant must show both (1) that counsel's performance fell below an objective standard of

reasonableness, and (2) that but for the deficiency, the likely outcome of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687-96, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Best has not met either prong of this test. Actions or omissions by counsel that " 'might be considered sound trial strategy' " do not constitute ineffective assistance. *Id.* at 689, 104 S.Ct. 2052 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). Counsel's election to forgo an unsupported argument plainly falls into this category. Similarly, counsel's decision as to "whether to call specific witnesses—even ones that might offer exculpatory evidence—is ordinarily not viewed as a lapse in professional representation." *United States v. Schmidt*, 105 F.3d 82, 90 (2d Cir.), cert. denied, 522 U.S. 846, 118 S.Ct. 130, 139 L.Ed.2d 80 (1997); *see also United States v. Smith*, 198 F.3d 377, 386 (2d Cir.1999) ("The decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial." (internal quotation marks omitted)).

In the present case, Best has not shown that the decisions he criticizes fell below an objective standard of reasonableness. It was hardly unreasonable, for example, for counsel not to argue that Best's memorandum was written before Maciejewski's, given that there was no proof that that was so and there was compelling evidence that Maciejewski's was written on May 6 and that Best's was written on May 13. Nor do we see anything unreasonable in counsel's decision not to call the potential witnesses. Calling witnesses to testify regarding Best's reputation for truthfulness would have opened the door for the government to attack Best's character; the decision whether to expose a defendant to such an attack is surely a tactical decision that cannot be second-guessed. With respect to Company procedures, the proposed witnesses' testimony as to whether

Best would have taken instruction from Voss would have been speculative.

In any event, given the strength of the government's case, discussed in Part II.B. above, we cannot conclude that there is any likelihood that different performance by counsel would have altered the outcome of the trial.

CONCLUSION

We have considered all of Best's arguments on this appeal and have found them to be without merit. The judgment of conviction is affirmed.

UNITED STATES of America,

v.

Jerome MACIEJEWSKI and James Best, Defendants.

No. 97-CR-0428.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

70 F.Supp.2d 129

Sept. 22, 1999.

DISPOSITION: Motion denied.

COUNSEL: Office of the United States Attorney, Syracuse, for the United States; Steven D. Clymer, AUSA, of counsel.

Dreyer, Boyajian Law Firm, Albany, NY, for Defendant Best; William J. Dreyer, of counsel.

Brown, Pinnisi Law Firm, Ithaca, for Defendant Best; Michael D. Pinnisi, of counsel.

JUDGES: THOMAS J. McAVOY, Chief Judge

OPINION BY: THOMAS J. McAVOY

OPINION: MEMORANDUM—DECISION & ORDER

THOMAS J. McAVOY, Chief Judge:

Defendant James Best ("Best") was convicted by a jury of

aiding and abetting in the execution of a scheme to defraud the United States in violation of 18 U.S.C. § 2 (aiding and abetting) and the Major Fraud Act, 18 U.S.C. § 1031. Currently before the Court is Best's motion pursuant to Fed. R. Crim. P. 29 for a judgment of acquittal or, in the alternative, pursuant to Fed. R. Crim. P. 33 for a new trial.

I. BACKGROUND

Because the Court is presented with Best's motion pursuant to Fed. R. Crim. P. 29, the following evidence is presented in the light most favorable to the government. *See Jackson v. Commonwealth of Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979); *United States v. Stephenson*, 183 F.3d 110, 113 (2d Cir.1999).

In 1992, Jerome Maciejewski ("Maciejewski") and Best were senior executives of WholeHealth Insurance Network, Inc. ("WIN") [FN1], a non-profit health insurance company. WIN had divisions in Buffalo, Albany, and Binghamton. Maciejewski was the Chief Operating Officer ("COO") of WIN's Binghamton Division, known as the Upstate Medicare Division ("UMD"). Best was the COO of the Albany Division.

> FN1. In December 1992, WIN merged with Blue Cross of Western New York to form Blue Cross Blue Shield of Western New York.

The Buffalo and Albany divisions were primarily involved in the sale of private health insurance policies. The UMD, however, had a contract with the Health Care Financing Administration to process claims for Part B of the Medicare Program. *See* 42 U.S.C. § 1395j, et seq.

The federal government contracts with "carriers" for the

administration of Medicare benefits. *See* 42 U.S.C. § 1395u. The UMD was the Medicare Part B carrier responsible for processing Part B claims for health care providers in Central, Western, and Upstate New York.

Under the Medicare contract, the federal government paid WIN's costs of administering the Medicare program. *See* 42 U.S.C. § 1395u(c). However, WIN's costs pertaining to the administration of its private health insurance programs would not be paid for by the government. In order to ensure proper payments from the government, each carrier was required to report all Medicare- related costs to HCFA on a monthly and yearly basis.

In 1991 and 1992, WIN was experiencing financial difficulties. In an effort to cut costs, in 1991, WIN consolidated the mailroom operations of its three divisions into the UMD. In or about April 1992, Maciejewski was promoted to Executive Vice President and COO of WIN. Thus, he had responsibility for all three WIN divisions. Best continued to act as COO for the Albany division.

Shortly after his promotion, Maciejewski directed that fifty percent (50%) of the postage costs of WIN's private insurance business be allocated to the Medicare program. This resulted in increased costs being charged to Medicare.

Each of the three WIN divisions had a professional relations department that educated health care providers about the billing practices necessary to submit claims for payment. The UMD was primarily responsible for providing professional relations with respect to the Medicare program and, accordingly, was reimbursed by Medicare for the costs of such professional relations. The Albany and Buffalo divisions were primarily responsible for providing professional relations with respect to

their private health insurance business and, thus, their provider relations costs were not reimbursable by Medicare. While the Albany division did provide some Medicare-related professional relations services until 1990, such Medicare-related activity had ceased by 1992.

In May 1992, Maciejewski instructed an employee in the Buffalo accounting department, Robert Gastle, to allocate fifty percent (50%) of the costs of the Buffalo and Albany professional relations departments to Medicare. Maciejewski also instructed that the allocation be made retroactive to January 1, 1992. Gastle relayed this information to WIN's comptroller, David Voss. Voss, however, expressed a reluctance to allocate non-Medicare costs to the Medicare program without written instructions.

After learning of Voss's hesitancy, Maciejewski told Gastle that he would generate a memorandum for Voss. Maciejewski also stated that he would "take care of it with Jim Best," *see* Def. Mem. of Law at 2.

On or about May 6, 1992, Maciejewski had a memorandum prepared directing Voss to reallocate fifty percent (50%) of the Buffalo division's professional relations costs to Medicare, and to make the allocation retroactive to January 1, 1992. [FN2] The memorandum was back-dated to February 3, 1992. The trial evidence demonstrated, however, that the Buffalo division was not, in fact, performing any Medicare-related professional relations. As a result of the memorandum, private business costs were allocated to the Medicare program.

FN2. The memorandum reads as follows:

Date: February 3, 1992
To: David Voss

Subject: Professional Relations Activity
From: Jerry Maciejewski

As you know, we have recently discussed the Professional Relations (PR) activity that Buffalo is performing for our Medicare division. With this in mind, it seems reasonable to allocate 50 percent of the PR cost centers to the Medicare division. This activity was reinstituted on January 1, 1992, therefore, this allocation should be retroactive to that date.

If you have any questions, please contact me.

On or about May 14, 1992, Best authored a memorandum similar to that of Maciejewski. [FN3] The Best memorandum requested that Voss "make the necessary adjustment in the cost allocation system to properly credit this department for its Medicare involvement." The memorandum further stated that "[s]ince the first of the year, Jerry Maciejewski has asked us to assist the Medicare B Operation by having our Professional Relations Representatives disseminate various [M]edicare information to our providers when they are making routine provider contacts and calls." As did Maciejewski, Best requested that fifty percent (50%) of the Albany division's provider relations costs be allocated to Medicare retroactive to January 1, 1992. As noted, however, in 1992, the Albany division's professional relations department had no involvement with the Medicare program. Similar to the Maciejewski memorandum, Best's memorandum was back-dated to February 18, 1992. As a result of Best's memorandum, private business costs were allocated to the Medicare program.

FN3. The memorandum reads as follows:

Date: February 18, 1992
Subject: BSNENY Professional Relations Dep't

(Cost Allocation)

From: James W. Best

Per this morning's conversation, please make the necessary adjustment in the cost allocation system to properly credit this department for its Medicare involvement. Since the first of the year, Jerry Maciejewski has asked us to assist the Medicare B Operation by having our Professional Relations Representatives disseminate various medicare information to our providers when they are making routine provider contacts and calls.

Therefore, would you please allocate 50% of the Department to the Binghamton Division retroactive to January 1, 1992.

Based on the foregoing, and other evidence adduced at trial, Best was convicted on one count of aiding and abetting the execution of a scheme to defraud the United States in violation of 18 U.S.C. §§ 2 and 1031.

Presently before the Court is Best's motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29 or, in the alternative, a new trial pursuant to Fed. R. Crim. P. 33.

II. DISCUSSION

A. Rule 29 Standard

A defendant challenging the sufficiency of the evidence following a conviction bears a heavy burden. *See United States v. Ragosta*, 970 F.2d 1085, 1089 (2d Cir.), cert. denied, 506 U.S. 1002, 113 S.Ct. 608, 121 L.Ed.2d 543 (1992). "A conviction will be upheld if, 'after viewing the evidence in the light most favorable to the prosecution,' the reviewing court finds that 'any rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt.' " *Id.* (quoting *Jackson*, 99 S.Ct. at 2789); *see also Stephenson*, 183 F.3d 110, 120 (2d Cir.1999); *United States v. Zagari*, 111 F.3d 307, 327 (2d Cir.), cert. denied, 522 U.S. 983, 118 S.Ct. 445, 139 L.Ed.2d 381 (1997). All reasonable inferences and all issues of credibility must be resolved in favor of the jury's verdict. *See United States v. Allah*, 130 F.3d 33, 45 (2d Cir.1997), cert. denied, 524 U.S. 940, 118 S.Ct. 2347, 141 L.Ed.2d 718 (1998); *United States v. Reyes*, 157 F.3d 949, 955 (2d Cir.1998).

Best moves for judgment of acquittal on the ground that there was insufficient evidence to establish liability under 18 U.S.C. § 2 (aiding and abetting). Specifically, Best argues that there was insufficient evidence for a fair-minded jury to conclude beyond a reasonable doubt that at the time he issued the memo to Voss he knew it was part of a scheme to defraud the government, or that he intended to defraud the government.

Pursuant to 18 U.S.C. § 2(a), "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

To be convicted of aiding and abetting, the defendant must have taken some conscious action that furthered the commission of the underlying crime. The government must therefore prove the underlying crime was committed by someone other than the defendant and that the defendant himself either acted or failed to act with the specific intent of advancing the commission of the underlying crime. To show specific intent the prosecution must prove the defendant knew of the proposed crime--suspicion that it might occur is not enough--and had an interest in furthering it. In sum, to prove the act and intent elements for aiding and abetting the commission of a crime, the evidence must demonstrate that

the defendant joined and shared in the underlying criminal endeavor and that his efforts contributed to its success.

United States v. Pipola, 83 F.3d 556, 562 (2d Cir.) (internal citations omitted), cert. denied, 519 U.S. 869, 117 S.Ct. 183, 136 L.Ed.2d 122 (1996). In short, to convict a defendant of aiding and abetting, the government must prove: (1) the commission of the underlying crime by a person other than the defendant; (2) that the defendant had the specific intent to assist in the commission of the underlying crime; and (3) that the defendant undertook a voluntary act or omission in order to assist the underlying crime. *See United States v. Wiley*, 846 F.2d 150, 154 (2d Cir.1988).

1. The Commission of the Underlying Crime by Someone Other than Best

Best does not argue that the government did not satisfy this element. Nonetheless, the government proved that the underlying substantive offense of a violation of 18 U.S.C. § 1031 was committed by Maciejewski or another. Accordingly, the government satisfied the first element of proving aider and abettor liability.

2. Specific Intent

The jury reasonably could have inferred from the evidence that Best knew of the proposed crime. *See United States v. Zambrano*, 776 F.2d 1091, 1097 (2d Cir.1985). In his memorandum to Voss, Best states that "[s]ince the first of the year [January 1, 1992], Jerry Maciejewski has asked us to assist in the Medicare B Operation by having our [Albany] Professional Relations Representatives disseminate various medicare information to our providers." However, Best knew that the Albany division had not performed any Medicare-

related work in 1992 and that the allocation was not justified. Best also knew that it was improper to allocate private business costs to the Medicare program without a valid reason. Thus, a reasonable jury could conclude beyond a reasonable doubt that Best was asking Voss to do something illegal--allocate non-Medicare costs from the Albany division to the Medicare Part B program. *See id.*

Moreover, the memorandum plainly states that this was done in conjunction with requests from Maciejewski to assist in the Medicare Part B operations. Thus, a reasonable jury could conclude that Best was acting in response to discussions with Maciejewski. In light of the foregoing, it takes no great logical leap for a jury to find that Best and Maciejewski had discussed allocating the costs from the Albany professional relations division to the Medicare Part B program, that Best knew that Maciejewski intended to allocate non-Medicare costs to the Medicare Part B program, and that Best knew it was illegal. Knowing this, Best nevertheless prepared the memorandum, back-dated it, and sent it to Voss. A reasonable jury could infer from this that Best acted with the requisite intent.

The jury's conclusion is further supported by other evidence admitted at trial. For instance, Voss declined to allocate private provider relations costs to Medicare without written instructions. Maciejewski responded that he would prepare a memorandum and "take care of things with Jim Best." Thereafter, both Maciejewski and Best prepared substantially similar memoranda requesting that fifty percent (50%) of the professional relations costs of the Buffalo and Albany divisions, respectively, be allocated to the Medicare Part B program. Both Best's and Maciejewski's memoranda were prepared during the same time frame, May 1996. Furthermore, both memoranda were back-dated to February 1992. It would certainly be reasonable for a jury to find that these similarities

between the Maciejewski and Best memoranda were more than coincidental. A jury could reasonably deduce from this, beyond a reasonable doubt, that Maciejewski had discussed with Best allocating non-Medicare related professional relations costs to the Medicare Part B program. Thus, the government presented sufficient evidence from which a fair-minded jury could find beyond a reasonable doubt that Best joined and shared in the underlying criminal activity.

There also was other sufficient evidence from which the jury could find, beyond a reasonable doubt, that Best acted with the intent to defraud. Best attempted to justify the allocation of non-Medicare professional relations costs to the Medicare program by falsely stating in his memorandum that he had been assisting in "the Medicare B Operation by having our Professional Relations Representatives disseminate various medicare information to our providers." However, as previously noted, Best knew that this was not true. Best knew that such a reallocation of costs would result in the federal government paying for private business costs. A jury could conclude beyond a reasonable doubt that Best had the specific intent to defraud based on the fact that he provided a false reason for allocating costs to the Medicare program. The fact that Best back-dated his memorandum is further evidence of intent. A jury could reasonably infer from the totality of the evidence before it that, by back-dating the memorandum, Best attempted to make the retroactive allocation appear legitimate; that is, that Best prepared the memorandum shortly after the Albany division purportedly began performing Medicare-related services, rather than six months after the fact.

3. Voluntary Act

Finally, a fair-minded jury could conclude beyond a reasonable doubt that Best's drafting (or directing the drafting) of the

memorandum ordering the reallocation of private business costs to the Medicare program constituted a voluntary act to assist in the completion of the underlying crime. Although Best contends that he prepared the memorandum at Voss's request, the jury reasonably could have discounted this evidence in light of the evidence that Best was Voss's superior and, thus, Voss could not direct Best to do ***135** anything. Furthermore, the jury reasonably could have determined that Voss was reluctant to reallocate costs to the Medicare program absent written authorization. Best provided the written authorization, thereby indicating that he initiated the authorization.

For the foregoing reasons, the Court finds that the government presented sufficient evidence from which a fairminded jury could reasonably conclude beyond a reasonable doubt that Best was guilty of aiding and abetting the commission of a major fraud against the United States in violation of 18 U.S.C. §§ 2 and 1031.

B. Standard Under Rule 33

Pursuant to Rule 33, a new trial may be granted if "required in the interest of justice." Fed. R. Crim. P. 33; *see also*, *United States v. Moreno*, 181 F.3d 206, 212 (2d Cir.1999). The decision to grant a motion for a new trial pursuant to Fed. R. Crim. P. 33 rests within the discretion of the trial judge. *See United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir.1992), cert. denied, 514 U.S. 1038, 115 S.Ct. 1404, 131 L.Ed.2d 291 (1995). Such motions are disfavored, *see United States v. Gambino*, 59 F.3d 353, 364 (2d Cir.1995), cert. denied, 517 U.S. 1187, 116 S.Ct. 1671, 134 L.Ed.2d 776 (1996), and should be granted only "in the most extraordinary circumstances." *United States v. Locascio*, 6 F.3d 924, 949 (2d Cir.1993), cert. denied, 511 U.S. 1070, 114 S.Ct. 1645, 128 L.Ed.2d 365

(1994). The burden of proving the need for a new trial lies with the defendant. *See United States v. Sasso*, 59 F.3d 341, 350 (2d Cir.1995). In deciding a Rule 33 motion, the Court may weigh the evidence and determine the credibility of witnesses, *see Sanchez*, 969 F.2d at 1413, and is not required to view the evidence in the light most favorable to the government. *See United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir.1980). Despite this, the Court's discretion is limited; it should only grant a new trial when it "concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred." *Id.*

Best moves for a new trial pursuant to Fed. R. Crim. P. 33 on the ground that he was prejudiced by the joint trial with Maciejewski and that the evidence preponderates heavily against the verdict. Best made similar arguments when he sought severance prior to trial, contending that it was likely that he would be found guilty by association because of the overwhelming amount of evidence against Maciejewski. The Court rejected these arguments, stating that:

> There is a strong preference for a joint trial because of the similarity of the underlying facts and Best does not set forth sufficient grounds for severance. If, at trial, Best feels that he will be prejudiced because the jury will not be able to properly distinguish the evidence against him and Maciejewski, then he may move for an appropriate limiting instruction.

At trial, the Court issued limiting instructions to the jury. Specifically, the Court instructed the jury that it should:

> give separate and personal consideration to each Defendant and to each count charged against him. In this regard, you should consider what the evidence in the case shows with respect to each Defendant and to each offense that each

Defendant is charged with. In sum, each Defendant should be considered individually and each count should be considered separately.

The Court further instructed the jury that:

There are two (2) defendants on trial before you. You must, as a matter of law, consider each count of the indictment and each defendant's involvement in that count separately, and you must return a separate verdict on each defendant for each count in which he is charged.

In reaching your verdict, bear in mind that guilt is personal and individual. Your verdict of guilty or not guilty must be based solely upon the evidence about each defendant. The case against each defendant, on each count, stands or falls upon the proof or lack of proof against that defendant alone, and your verdict as to any defendant on any count should not control your decision as to any other defendant or any other count.

Thus, the jury was adequately instructed to consider the evidence against Best separately from that against Maciejewski, and to consider only that evidence pertinent to the Count with which Best was charged as an aider and abettor. In light of the limiting instructions, and given the similarity of the underlying facts and the connection between Maciejewski and Best, it cannot be said that Best was prejudiced by a joint trial.

As previously discussed above with respect to Best's motion pursuant to Rule 29, the Court rejects the contention that the weight of the evidence preponderated in favor of acquittal. There was sufficient evidence from which a fair-minded jury could conclude beyond a reasonable doubt that Maciejewski and Best had discussed allocating private provider relations costs to the Medicare Part B program, that Best knew that allocating the Albany division's provider relations costs to the

Medicare program was improper, and that Best drafted the memorandum directing that the Albany division's provider relations costs be so allocated in response to his discussions with Maciejewski.

C. Best's Change of Attorneys

Approximately one month after the verdict, Best, through his trial counsel, filed the above-discussed post-trial motion, which was made returnable on the Court's September 13, 1999 motion calendar. In accordance with N.D.N.Y. L.R. 12.1(a) (Criminal Procedure), and N.D.N.Y. L.R. 7.1(b)(2), the government timely filed opposition papers. Best's trial counsel did not seek, and this Court did not grant, leave to file reply papers. *See* N.D.N.Y. L.R. 7.1(b)(2).

After the above-discussed post-trial motions had been fully briefed, filed, and made returnable on the Court's September 13, 1999 motion calendar, Best retained the services of Brown, Pinnisi & Michaels (the "Brown, Pinnisi Firm"). On September 3, 1999, the Brown, Pinnisi Firm entered their appearance on behalf of Best "in post-trial motions and, if necessary, in sentencing matters." *See* Brown, Pinnisi Notice of Appearance, Docket No. 70. By letter dated September 3, 1999, the Brown, Pinnisi Firm wrote this Court requesting a two month extension of time to "acquaint itself with the trial record ... to conduct appropriate legal and factual research ... [and to] be permitted to submit supplemental papers in support of [the post-trial] motion ... [as well as] argue additional grounds in support of the motion for new trial." Because Best's trial counsel prepared the post-trial motions, the post-trial motions had been fully briefed, there was no indication that Best's trial counsel was not representing him fully, adequately, or competently, and Best's trial counsel was obligated to continue representing him until such time as this

Court permitted them to withdraw, *see* N.D.N.Y. L.R. 44.2 (Criminal Procedure), the Court denied, in part, the Brown, Pinnisi Firm's request. Because the government did not object to the Brown, Pinnisi Firm supplementing arguments in the post-trial motion, as opposed to raising new arguments, the Court permitted the Brown, Pinnisi firm to submit supplemental papers. In addressing Best's post-trial motions above, the Court considered these supplemental papers.

The Brown, Pinnisi Firm also submitted a letter requesting that the Court reconsider its denial of the previous request for an extension of time and to raise additional arguments. In this letter, the Brown, Pinnisi Firm took the liberty of setting forth the new arguments.

The Court denies the Brown, Pinnisi Firm's motion for reconsideration and declines the invitation to consider these new arguments. Even if the Court considered these submissions as part of the supplemental papers or as a Reply Brief, "new arguments may not be made in a reply brief." *The Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110, 112 (2d Cir. 1999). Considering these new arguments at this late stage would not allow the government an opportunity to respond. The Court cannot permit the briefing of the post-trial motions to continue ad infinitum. *See Tetra Technologies, Inc. v. Harter*, 823 F.Supp. 1116, 1120 (S.D.N.Y. 1993) ("Nor may entirely new but foreseeable points relevant to a motion be presented in a reply.... Were tactics of this type to be permitted, a sur-reply affidavit would be necessary from the adversary, followed by a further supplemental response by the moving party, and so on ad infinitum.").

Best, through his trial counsel, had a full and fair opportunity to present his post-trial motion. As noted, there is no indication that Best's trial counsel did not competently and

adequately brief the post-trial motion. Accordingly, the Court "decline[s] to entertain the theories so proffered." *Id.*

III. CONCLUSION

For the foregoing reasons, Best's motion for a Judgment of Acquittal pursuant to Rule 29 or, in the alternative for a new trial pursuant to Rule 33, is DENIED.

IT IS SO ORDERED

Relevant orally-given and transcribed findings of fact and conclusions of law of the District Court, entered in conjunction with the judgment sought to be reviewed.

District Court's ruling admitting state-of-mind hearsay evidence of Macie against petitioner Best, tanscribed at page 328 of the trial transcript of June 9, 1999:

MR DREYER [Best's trial counsel]: That's the issue of the Gastle statement about Macie having told him he was going to call Mr. Best in the future.

THE COURT: Right. The question is whether or not – can that be admitted against Best. It's clear it can be against Mr. Maciejewski but the Court thinks, as was state by someone yesterday after reviewing the case law, that if, in fact, the memoranda came out afterwards, signed by Mr. Best to Mr. Voss –

MR. DREYER: Voss.

THE COURT: It contained substantially the same information that the Maciejewski memoranda contained. It was backdated to the same time. It was issued contemporaneous, almost with the time the statement was alleged to be made. So the Court thinks that's sufficient corroborative evidence to be – allow to be admitted against Best. There has to be corroborative evidence. That's clear. The Court thinks that's sufficient.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated Term of the United states Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 19th day of September two thousand.

Present:

Hon. Amayala L. Kearse
Hon. Richard J. Cardamone
Hon. John M. Walker, Jr.
CIRCUIT JUDGES,

USA

Appellee

v. Docket No. 99-1646 (L)

Maciejewski (Best)

Defendant-Appellant

A petition for panel rehearing having been filed herein by James Best.

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: (signature)
Beth J. Meador
Administrative Attorney

Filed: September 19, 2000

18 U.S.C.A. § 1031 MAJOR FRAUD AGAINST THE UNITED STATES

(a) Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent—

(1) to defraud the United States; or

(2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises, in any procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is $1,000,000 or more shall, subject to the applicability of subsection (c) of this section, be fined not more than $1,000,000, or imprisoned not more than 10 years, or both.

(b) The fine imposed for an offense under this section may exceed the maximum otherwise provided by law, if such fine does not exceed $5,000,000 and--

(1) the gross loss to the Government or the gross gain to a defendant is $500,000 or greater; or

(2) the offense involves a conscious or reckless risk of serious personal injury.

(c) The maximum fine imposed upon a defendant for a prosecution including a prosecution with multiple counts under this section shall not exceed $10,000,000.

(d) Nothing in this section shall preclude a court from

imposing any other sentences available under this title, including without limitation a fine up to twice the amount of the gross loss or gross gain involved in the offense pursuant to 18 U.S.C. section 3571(d).

(e) In determining the amount of the fine, the court shall consider the factors set forth in 18 U.S.C. sections 3553 and 3572, and the factors set forth in the guidelines and policy statements of the United States Sentencing Commission, including--

(1) the need to reflect the seriousness of the offense, including the harm or loss to the victim and the gain to the defendant;

(2) whether the defendant previously has been fined for a similar offense; and

(3) any other pertinent equitable considerations.

(f) A prosecution of an offense under this section may be commenced any time not later than 7 years after the offense is committed, plus any additional time otherwise allowed by law.

(g)(1) In special circumstances and in his or her sole discretion, the Attorney General is authorized to make payments from funds appropriated to the Department of Justice to persons who furnish information relating to a possible prosecution under this section. The amount of such payment shall not exceed $250,000. Upon application by the Attorney General, the court may order that the Department shall be reimbursed for a payment from a criminal fine imposed under this section.

(2) An individual is not eligible for such a payment if--

(A) that individual is an officer or employee of a Government agency who furnishes information or renders service in the performance of official duties;

(B) that individual failed to furnish the information to the individual's employer prior to furnishing it to law enforcement authorities, unless the court determines the individual has justifiable reasons for that failure;

(C) the furnished information is based upon public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or GAO report, hearing, audit or investigation, or from the news media unless the person is the original source of the information. For the purposes of this subsection, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government; or

(D) that individual participated in the violation of this section with respect to which such payment would be made.

(3) The failure of the Attorney General to authorize a payment shall not be subject to judicial review.

(h) Any individual who--

(1) is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by an employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of a prosecution under this section

(including investigation for, initiation of, testimony for, or assistance in such prosecution), and

(2) was not a participant in the unlawful activity that is the subject of said prosecution, may, in a civil action, obtain all relief necessary to make such individual whole. Such relief shall include reinstatement with the same seniority status such individual would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees.

18 USC § 2 PRINCIPALS
(AIDER AND ABETTOR ACT)

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

FEDERAL RULE OF EVIDENCE 802
THE HEARSAY RULE

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

FEDERAL RULE OF EVIDENCE 803(3) THE "STATE OF MIND" EXCEPTION TO THE HEARSAY RULE

The following are not excluded by the hearsay rule, even thought the defendant is available as a witness:

* * *

(3) Then existing mental, emotional, or physical condition.

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Other material petitioner believes essential to understand the petition, included pursuant to Supreme Court Rule 14(i)(vi).

Trial colloquy during which Gastle provided the contested hearsay testimony, tanscribed at page 689 of the trial transcript of June 10, 1999:

Robert Gastle – Direct
Questioning by Mr. Clymer, Assistant United States Attorney

* * *

Q. In addition to the conversation you've already described, when you went back to Maciejewski after talking to David Voss, did Maciejewski mention to you a memo from somebody else?

A. Mr. Maciejewski told me that he would call Albany and talk to Jim and take care of it with the Albany division.

Q. Who was Jim in Albany.

A. Jim Best.

* * *

(2)

Supreme Court, U.S.
FILED
MAR 30 2001
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No. 00-1057

In the Supreme Court of the United States

JAMES BEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether the district court properly admitted at petitioner's trial, pursuant to Federal Rule of Evidence 803(3), a co-defendant's out-of-court statement of his intent to perform a certain act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 219 F.3d 192. The opinion of the district court (Pet. App. 18a-33a) is reported at 70 F. Supp. 2d 129.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2000. A petition for rehearing was denied on September 19, 2000 (Pet. App. 35a). The petition for a writ of certiorari was filed on December 18, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of New York, petitioner was convicted of aiding and abetting a major fraud against the United States, in violation of 18 U.S.C. 1031 and 2. Petitioner was sentenced to a three-year term of probation, to include eight months of home detention. The court of appeals affirmed. Pet. App. 1a-17a.

1. Petitioner and co-defendant Jerome Maciejewski were senior executives of WholeHealth Insurance Network (WIN), a private health insurance company with divisions in Buffalo, Albany, and Binghamton, New York. WIN also processed certain Medicare claims pursuant to a contract with the United States Health Care Financing Administration (HCFA). HCFA reimbursed WIN for the administrative costs of processing those claims, but it prohibited WIN from using Medicare funds to pay for expenses incurred in the operation of WIN's private insurance business. Gov't C.A. Br. 4-5. The indictment in this case charged Maciejewski with six counts of causing fraudulent claims to be submitted to HCFA, and charged petitioner with one count of aiding and abetting the submission of fraudulent claims. Petitioner and Maciejewski were tried jointly and convicted on all counts.

The evidence at trial established that, in 1992, petitioner was a Senior Vice President of WIN and the Chief Operating Officer of the Albany Division. Maciejewski was a Senior Vice President and Chief Operating Officer of the Binghamton Division. In April 1992, Maciejewski was promoted to Chief Operating Officer of the entire company. WIN's Albany and Buffalo divisions were involved primarily in the private

health insurance business. The Binghamton division was involved exclusively in processing Medicare claims. Each of the three divisions had a "professional relations" department that served as a liaison between the company and health care providers. Professional relations employees in the Binghamton division were specially trained in Medicare rules and procedures. Professional relations employees in the Albany and Buffalo divisions were not trained to do Medicare-related work, and they did no such work. Pet. App. 3a; Gov't C.A. Br. 4-6.

In 1992, WIN was in serious financial difficulty. When Maciejewski was promoted to Chief Operating Officer of the entire company in April 1992, he moved to cut corporate costs and sought other sources of funds, including increased payments from HCFA. In early May 1992, Maciejewski met privately with Robert Gastle, an employee in WIN's finance department who was responsible for the Medicare budgeting and reporting process. Maciejewski instructed Gastle to inform David Voss, the company's vice president of finance, that Maciejewski wanted Voss to allocate 50% of the costs of Buffalo's professional relations department to Medicare, and to make that allocation retroactive to January 1992. As a result of that change, the Buffalo division would receive more money from HCFA, which would help fund WIN's non-Medicare expenses. Maciejewski said that he would have the Buffalo professional relations employees start distributing Medicare materials to justify the allocation. Pet. App. 3a-4a; Gov't C.A. Br. 5-7.

Gastle relayed Maciejewski's instructions to Voss, but Voss refused to implement the allocation without written instructions. Although Maciejewski expressed displeasure at Voss's response, Maciejewski had his

executive secretary type and initial a memorandum to Voss on May 6, 1992. The memorandum was backdated to February 3, 1992, and it stated:

> As you know, we have recently discussed the Professional Relations (PR) activity that Buffalo is performing for our Medicare division. With this in mind, it seems reasonable to allocate 50 percent of the PR cost centers to the Medicare division. This activity was reinstituted on January 1, 1992, therefore, this allocation should be retroactive to that date. If you have any questions, please contact me.

Pet. App. 4a-5a. On June 3, 1992, Voss received the memorandum. *Id.* at 4a.

When Gastle reported Voss's response to Maciejewski, Maciejewski said that "he would call Albany and talk to Jim and take care of it with the Albany division." Pet. App. 5a. "Jim" was petitioner James Best; he and Maciejewski were friends. On or about May 13, 1992, petitioner and Maciejewski attended a series of meetings together in Albany. Sometime between May 13 and May 15, petitioner had his executive secretary type and initial the following memorandum to Voss:

> Per this morning's conversation, please make the necessary adjustment in the cost allocation system to properly credit this department for its Medicare involvement. Since the first of the year, Jerry Maciejewski has asked us to assist the Medicare B Operation by having our Professional Relations Representatives disseminate various medicare information to our providers when they are making routine provider contacts and calls.

> Therefore, would you please allocate 50% of the Department to the Binghamton Division retroactive to January 1, 1992.

Id. at 5a-6a. That memorandum was backdated to February 18, 1992, and Voss received it on May 15, 1992. *Id.* at 5a.

Neither Maciejewski nor petitioner ever instructed the Albany or Buffalo professional relations departments to do any Medicare-related work in 1992, and neither of those departments in fact did any such work. As a result of the cost allocations ordered by Maciejewski and petitioner, however, Medicare paid nearly $460,000 in non-reimbursable private insurance professional relations costs. Almost $165,000 of that sum went to the Albany division. Pet. App. 6a; Gov't C.A. Br. 9-10.

Petitioner testified in his own defense. He admitted that he had his secretary type and initial the memorandum to Voss in the second week of May 1992. Petitioner denied, however, having any discussions with Maciejewski about the memorandum or about the allocation of professional relations costs. He claimed instead that Voss had instructed him to write the memorandum, and that Voss had dictated its contents and told petitioner to backdate it. Petitioner claimed that, based on what Voss had told him, he believed when he wrote the memorandum that the professional relations employees in Albany were actually doing Medicare work. On cross-examination, however, petitioner conceded that he was senior to Voss in the company hierarchy, that Voss (who worked in Buffalo) had nothing to do with the Albany professional relations department's dissemination of Medicare information, and that the supervisors of that department

reported to petitioner, not to Voss. Pet. App. 6a; Gov't C.A. Br. 11-12.

2. Before trial the government informed defense counsel that it would seek to introduce Gastle's testimony that Maciejewski said he would "call Albany and talk to Jim [Best] and take care of it [the allocation of private insurance professional relations costs to Medicare] with the Albany division." Gov't C.A. Br. 16. The government argued that the testimony was admissible under Federal Rule of Evidence 803(3) as a statement of Maciejewski's then-existing intent.[1] Petitioner objected, arguing that a declarant's stated intent to perform a future act can only be admitted to prove the conduct of a nondeclarant when there is independent evidence corroborating that the act was performed. Petitioner contended that such evidence was absent in this case. The government responded that Maciejewski's statement was admissible against petitioner not to prove any conduct by petitioner, but as evidence tending to prove that Maciejewski had acted in accordance with his expressed intent. The government also argued that, in any event, petitioner's memorandum to Voss provided the necessary corro-

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[1] Rule 803 enumerates various exceptions to the hearsay rule, including the following:

> (3)**Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Fed. R. Evid. 803(3).

boration that Maciejewski had indeed contacted petitioner. See Pet. App. 7a-8a.

The trial court reserved decision, and then held during the trial that the statement was admissible. The court concluded that Maciejewski's stated intent to contact petitioner was sufficiently corroborated by the fact that petitioner's memorandum to Voss was substantially the same as Maciejewski's memorandum and was created shortly after Maciejewski told Gastle that he intended to contact petitioner. Pet. App. 8a.

3. The court of appeals affirmed. Pet. App. 1a-17a. The court noted that, under Rule 803(3), a declarant's out-of-court statement of intent to perform a certain act in the future may, if relevant, be introduced "to prove that the declarant thereafter acted in accordance with the stated intent." *Id.* at 9a (citing *Mutual Life Ins. Co.* v. *Hillmon*, 145 U.S. 285, 295-296 (1892), and Fed. R. Evid. 803 advisory committee's note to para. (3)). Citing several of its own prior decisions, the court further explained that such a statement may also be introduced against someone other than the declarant if there is "independent evidence that connect[s] the declarant's statement with the non-declarant's activities." Pet. App. 9a.

The court of appeals held that in this case there was "ample independent proof" that Maciejewski, after making his statement, asked petitioner to prepare a Medicare reallocation memorandum for the Albany division. Pet. App. 11a. The court noted that Maciejewski met with petitioner shortly after telling Gastle that he would ask petitioner to take care of the Albany allocation; that petitioner immediately thereafter wrote his memorandum to Voss; and that petitioner's memorandum "was in substance identical to the memorandum written by Maciejewski." *Ibid.* Accordingly,

the court concluded, petitioner's conduct "was proven not by Maciejewski's statement of what he would ask [petitioner] to do, but rather by the direct evidence of what [petitioner] did. We see no error in the district court's admission of Maciejewski's statement against [petitioner]." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 8-10) that this Court should grant certiorari to resolve conflicts within the circuits on two questions: (1) whether, under Federal Rule of Evidence 803(3), a declarant's statement of intent may ever be introduced to prove the subsequent conduct of a non-declarant, and (2) if so, whether independent evidence connecting the hearsay statement with the non-declarant's conduct is a prerequisite for admissibility. Neither question is presented in this case and certiorari is therefore not warranted. Both the district court and the court of appeals correctly determined that Maciejewski's statement was properly admitted under Rule 803(3), and there is no conflict among the circuits on the admissibility of an out-of-court statement of intent in circumstances like those presented here.

1. Federal Rule of Evidence 803 enumerates various exceptions to the general bar on the admission of hearsay in federal trials. Rule 803(3) permits the introduction of "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." The Rule codifies the "state of mind" hearsay exception long recognized in the common law.

In *Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S. 285 (1892), this Court held that a declarant's out-of-court statement of intent to perform an act was ad-

missible as proof of his subsequent conduct. In that case, widow Sallie Hillmon brought a civil suit to collect on life insurance policies held by her husband, who allegedly died at a campsite at Crooked Creek, Kansas. The defendant insurance companies contended that the body found at Crooked Creek was the body of one Frederick Walters, not of John Hillmon. The defendants sought to introduce evidence that, shortly before the body was discovered, Walters had told two people that he planned to leave Wichita shortly and travel west with Hillmon. The Court held that the evidence was competent and relevant, and should have been admitted:

> The evidence that Walters was at Wichita on or before March 5th, and had not been heard from since, together with the evidence to identify as his the body found at Crooked creek on March 18th, tended to show that he went from Wichita to Crooked creek between those dates. Evidence that just before March 5th he had the intention of leaving Wichita with Hillmon would tend to corroborate the evidence already admitted, and to show that he went from Wichita to Crooked creek with Hillmon.

145 U.S. at 294-295. The Court further reasoned that the proposed evidence was competent not "as proof that [Walters] actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon than if there had been no proof of such intention." *Id.* at 296. See also *id.* at 295 ("whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be

proved by contemporaneous oral or written declarations of the party").

2. Petitioner states that the trial court erred in admitting testimony that Maciejewski said he intended to call petitioner and "take care of" the Medicare allocation issue with the Albany division. Pet. ii. Petitioner argues that neither Rule 803(3) nor *Hillmon* authorizes the admission of a declarant's hearsay statement of intent against a third party in order to prove that party's subsequent conduct. See, *e.g.*, Pet. 6, 7, 10-13.

Petitioner's argument rests on a fundamentally flawed premise. Maciejewski's statement was not admitted to prove petitioner's subsequent conduct. It was admitted only because of its tendency to show Maciejewski's own subsequent conduct, *i.e.*, that "Maciejewski called [petitioner] as he told Gastle he would." Pet. C.A. App. 35. Petitioner's own conduct was essentially undisputed at trial. The government contended that petitioner sent a memorandum to David Voss instructing Voss to allocate 50% of Albany's professional relations costs to Medicare; the government offered that memorandum into evidence; and petitioner admitted that he directed his secretary to type it and send it to Voss. Thus, Maciejewski's statement that he intended to have petitioner "take care of" the Medicare allocation problem for the Albany division was not necessary to prove that petitioner did just that. The memorandum itself, along with petitioner's admissions, were ample proof of petitioner's conduct.

The government offered Maciejewski's statement only as proof that Maciejewski likely acted on his declared intention and contacted petitioner. That evidence was relevant because it tended to show that petitioner wrote the allocation memorandum at Macie-

jewski's direction or request, rather than at Voss's direction as petitioner claimed. Put another way, the evidence tended to show the *motive* for petitioner's conduct, although it did not prove (and was not offered to prove) the conduct itself.[2]

3. Contrary to petitioner's assertion (Pet. 9), there is wide agreement among the courts of appeals that hearsay statements of intent are admissible in circumstances like those presented here. For example, in *United States* v. *Jenkins*, 579 F.2d 840 (4th Cir.), cert. denied, 439 U.S. 967 (1978), defendant Jenkins and "Miss B" were observed late one evening outside the

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[2] The prosecutor's discussion of Maciejewski's statement in summation demonstrates the limited purpose for which the statement was offered. See Pet. C.A. App. 103-104 ("The second thing [Maciejewski] says, very significant, is I'll contact Jim in Albany to take care of it. * * * Now, there's no direct evidence in this case that Maciejewski picked up the phone and called [petitioner]. We know that Maciejewski told Gastle he would. We don't have evidence he actually did it but we do know * * * within a day or two of the time that [petitioner] actually issues this memo, he and Maciejewski were together in Albany. They were together on the 13, 14, 15 of May in 1992, exactly the time [petitioner] was having his secretary generate that memo."); *id.* at 107 ("Maciejewski and [petitioner] have tried as hard as they possibly can to blame David Voss for these memos. * * * They want you to believe that there was never any communication about these memos between [petitioner] and Maciejewski, even though Gastle told you that Maciejewski had told him I'll contact [petitioner] to take care of Albany."); *id.* at 110 ("[Maciejewski] says I'll call Jim to take care of Albany. There is no direct evidence that telephone call was ever made. But that doesn't mean it's fiction or speculation. Why not? Let's look at the circumstantial evidence. One, Maciejewski said he was going to do it. Our common experience tells us when somebody wants something to be done, Maciejewski wanted the PR allocation to be done, and they say they're going to do something, they then do it.").

residence of one Lyles. Jenkins was charged with perjury based on his statements to a grand jury about the reason for his presence at that location. The trial court admitted evidence that, earlier on the evening in question, "Miss B" had a phone conversation with Lyles in which she stated that she would meet Lyles at his house within an hour. The court of appeals affirmed, holding that the evidence was admissible under Rule 803(3)

> to apprise the jury of "Miss B's" state of mind—her *knowledge* that Lyles was waiting to complete a transaction with her and her *intention* to go to meet him. Given this knowledge and intention, the jury might reasonably infer, *from the fact that* ["Miss B"] *and Jenkins appeared at Lyles' residence very shortly thereafter*, that Jenkins drove there because ["Miss B"] had asked him to do so. If the jury reached this conclusion, it could properly conclude that Jenkins had lied about his reason for making the trip.

Id. at 842. As in this case, the evidence of Miss B's state of mind was not offered to prove the defendant's conduct, for "substantial independent evidence was introduced" to prove that Jenkins drove Miss B to Lyles' residence. *Id.* at 843. The evidence instead was admissible for its tendency, through a chain of inferences, "to show *why* Jenkins behaved as he did." *Id.* at 844.[3]

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[3] Petitioner therefore errs in asserting (Pet. 9) that the Fourth Circuit does not permit evidence of a declarant's out-of-court statement of future intent to be admitted against a non-declarant. Moreover, petitioner's reliance (*ibid.*) on a footnote in *Gual Morales* v. *Hernandez Vega*, 579 F.2d 677, 680 n.2 (1st Cir. 1978), also does not support his claim of a circuit conflict. The language

At least three other circuits have upheld the admission of state of mind evidence under Rule 803(3) in similar circumstances. In *United States* v. *Donley*, 878 F.2d 735 (3d Cir. 1989), cert. denied, 494 U.S. 1058 (1990), the defendant admitted killing his wife, but claimed that he did so in the heat of passion after finding her with another man. The trial court admitted testimony that, just before her death, the wife had told the defendant that she planned to move out of their home and obtain a separation. See *id.* at 737. The court of appeals affirmed, holding that

> [t]he testimony went not to show that the defendant was soon to kill the declarant, but, rather, to show the existence of the deceased's plan to move out of the base apartment and separate from her husband. The government properly sought to persuade the jury to infer from her statements that she had such a plan and, in turn, to infer from that plan and the defendant's awareness of it that he had a motive for murder other than the one he claimed.

Id. at 737-738. See also *United States* v. *Astorga-Torres*, 682 F.2d 1331, 1335-1336 (9th Cir.) (drug dealer's statement to undercover agents that he intended to bring someone to guard him during a drug transaction held admissible as tending to prove that he did so and permitting jury to infer that appellants' presence at drug transaction was not innocent), cert. denied, 459 U.S. 1040 (1982); *United States* v. *Calvert*, 523 F.2d 895, 910 (8th Cir. 1975) (widow testifies that her husband had said he intended to speak with the

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cited by petitioner is dicta and we have found no other First Circuit case holding or suggesting that Rule 803(3) does not permit a statement of intent to be admitted against a non-declarant where the statement is relevant to prove a disputed issue.

defendant about ending their partnership and canceling their insurance policies; testimony properly admitted to show that deceased had likely acted in conformity with his intention, which would "establish the immediate motivation" for defendant's effort to arrange quickly for the deceased's murder), cert. denied, 424 U.S. 911 (1976).

Because there was no dispute about what petitioner *did* in this case (*i.e.*, causing an allocation memorandum to be sent to Voss), petitioner errs in relying (see Pet. 9) on cases in which a declarant's statement of intent is offered to prove the conduct of a non-declarant. In *United States* v. *Delvecchio*, 816 F.2d 859 (2d Cir. 1987), for example, an informant told law enforcement agents that he intended to meet with Amen and Delvecchio on a certain date. The agents conducted surveillance and saw the informant meet with Amen, while a third individual—whom the agents could not see clearly—remained seated in the car. *Id.* at 861. The Second Circuit held that it was error to admit the informant's out-of-court statement of intent as proof that Delvecchio attended the meeting, in the absence of any other evidence to suggest that he did so. *Id.* at 862-863. Here, however, the out-of-court statement was not admitted to prove what a non-declarant did. Accordingly, even if petitioner is correct (Pet. 9) that the courts of appeals are divided on the question whether independent evidence connecting the declarant's statement with the non-declarant's conduct is a prerequisite for admitting the statement to prove that conduct, that issue is not implicated in this case. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2001